Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
National Cable and Telecommunications Association	)	WC Docket No. WC 11-118
	)	
	)	
Petitions Regarding Section 652 Of the Communications Act	)	
	)	
	)	

COMMENTS OF THE

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SUMMARY

The American Cable Association ("ACA") is a trade organization representing nearly 900 smaller and medium-sized, independent cable companies who provide broadband services for more than 7.6 million cable subscribers primarily located in rural and smaller suburban markets across America. In these comments, ACA supports the petition for declaratory Ruling ("PDR") and the conditional petition for forbearance ("Forbearance Petition;" with the PDR, the "Petitions") filed by the National Cable and Telecommunications Association ("NCTA") to prevent or limit the application of Section 652 of the Communications Act, as amended (the "Act"), to mergers and acquisitions between cable operators and competitive local exchange carriers ("CLECs").

Restricting the applicability of Section 652 as proposed by NCTA would serve the public interest. Because of their complementary capabilities, alliances between cable companies and CLECs can promote greater facilities-based competition with incumbent local exchange carriers ("ILECs") and other providers, putting downward pressure on rates, increasing the offering of innovative services, and enhancing service quality. There is very little likelihood of antitrust concerns with such arrangements because both cable companies and CLECs are non-dominant providers of local telecommunications services, and, as noted above, they generally serve different customer segments.

Despite the clear advantages of cable-CLEC alliances, the cable-telephone buyout restrictions in Section 652 have had a chilling effect on these transactions. Limiting the application of Section 652 to transactions involving ILECs and cable companies will encourage cable company-CLEC transactions, to the ultimate benefit of American consumers and businesses. Such an interpretation of Section 652 is consistent with the history and underlying

purpose of this section. At the same time, limiting the application of Section 652 as NCTA proposes in its Petitions will not compromise the rights of local franchise authorities ("LFAs") or other interested parties vis-à-vis CLEC-cable company mergers. Such transactions will continue to be subject to the Commission's approval processes for transfers of control and assignment of assets.

The PDR and the Forbearance Petition each satisfy the applicable legal criteria for grant. Since the public interest would be served by restricting the applicability of Section 652 as proposed by NCTA, the Commission should grant NCTA's requested relief. If the Commission decides not to restrict the applicability of Section 652 as proposed by NCTA, the FCC should, at a minimum, adopt rules to govern the process for obtaining a waiver of the cable-telephone company buyout restrictions under Section 652(e). Among other things, the Commission should limit the grounds on which an LFA's objection to a CLEC/cable company merger will veto the waiver to transaction-specific reasons. In addition, the Commission should establish a range of procedures for notifying affected LFAs about a proposed transaction, and tailor the notice process required to the circumstances of the particular case.

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COMMENTS OF THE AMERICAN CABLE ASSOCIATION

I. INTRODUCTION

The American Cable Association ("ACA")[1], by its attorneys, respectfully submits these Comments in response to the Commission's public notice regarding the petition for declaratory ruling ("PDR") and the conditional petition for forbearance ("Forbearance Petition;" with the PDR, the "Petitions") of the National Cable and Telecommunications Association ("NCTA").[2] In the Petitions, NCTA seeks to prevent or limit the application of Section 652 of the Communications Act, as amended (the "Act"), to mergers and acquisitions between cable operators and competitive local exchange carriers ("CLECs").

As discussed in these comments, mergers and acquisitions between cable companies and CLECs promote facilities-based competition in the provision of local services and thus serve the

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1 ACA is a trade organization representing nearly 900 smaller and medium-sized, independent cable companies who provide broadband services for more than 7.6 million cable subscribers primarily located in rural and smaller suburban markets across America. Accordingly, ACA has a direct and vital interest in this proceeding.

2 *Comment Sought on NCTA Petitions Regarding Section 652 of the Communications Act, Pleading Cycle Established*, Docket No. WC 11-118, Public Notice DA 11-1177, rel. July 8, 2011.

public interest. The Petitions satisfy the applicable legal criteria for grant. As such, the Commission should grant the Petitions.

II. THE PUBLIC INTEREST WOULD BE SERVED BY A DETERMINATION THAT SECTION 652 OF THE ACT DOES NOT APPLY TO MERGERS AND ACQUISITIONS BETWEEN CLECS AND CABLE COMPANIES.

In its PDR, NCTA asks that the Commission issue a ruling to clarify that Section 652 of the Act does not apply to transactions between cable operators and CLECs.[3] In the alternative, NCTA requests in its Forbearance Petition that the FCC forbear from enforcing Section 652 of the Act to mergers, acquisitions, and other transactions between cable operators and CLECs.[4] Restricting the applicability of Section 652 as proposed by NCTA would serve the public interest. As such, grant of the Petitions is warranted.

A. Mergers between CLECs and cable companies can promote facilities-based competition in the local services market, thereby benefiting American consumers and businesses.

In today's market, the public can benefit from the merger of cable companies and CLECs. Cable companies and CLECs are in many respects complementary businesses. Cable operators have typically focused on the consumer/residential market, where they most often provide the triple-play of video, voice, and broadband services. However, when it comes to serving business customers, especially larger customers, cable operators have less experience and their networks generally do not reach these premises. In contrast, CLECs have traditionally focused on providing telecommunications services to business customers in competition to dominant incumbent local exchange carriers ("ILECs"). Over time, CLECs, in seeking to gain a

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3 PDR at 1.

4 Forbearance Petition at 1.

toehold in the market and build their share, have developed extensive operational, marketing, and technical expertise to serve these business customers.

Because of these complementary capabilities, alliances between cable companies and CLECs can promote greater facilities-based competition with ILECs and other providers, putting downward pressure on rates, increasing the offering of innovative services, and enhancing service quality. Such alliances can lead to the migration of the CLEC's services from leased to owned facilities and the expansion of cable services throughout business districts. Giving a CLEC access to a cable network's facilities can reduce the CLEC's operational costs, while cable companies can benefit from access to the CLEC's back-office infrastructure and established relationships with business customers. Consumers and business customers are the ultimate beneficiaries, in terms of improved network reliability, innovative new services, lower prices, and increased options.[5]

B. The burdens of Section 652, as illustrated by *CIMCO* and *NTELOS*, discourage CLECs and cable companies from merging.

Despite the clear advantages of cable-CLEC alliances, the cable-telephone buyout restrictions in Section 652 of the Act have had a chilling effect on these transactions. The two cable-CLEC business arrangements in which a Section 652 waiver was required – *CIMCO*[6] and

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5 In addition to the public interest benefits that are likely to result from cable-CLEC combinations, there is very little likelihood of antitrust concerns because both cable companies and CLECs are non-dominant providers of local telecommunications services, and, as noted above, they generally serve different customer segments. Even if antitrust concerns were to arise, the Commission along with the Department of Justice and Federal Trade Commission have ample authority to review proposed cable-CLEC combinations and block or condition their approval if significant competitive harms are likely.

6 *Applications Filed For the Acquisition of Certain Assets of CIMCO Communications, Inc. by Comcast Phone LLC, Comcast Phone of Michigan, LLC and Comcast Business Communications, LLC, Memorandum Opinion and Order and Order on Reconsiderations,* WC Docket No. 09-183, 25 FCC Rcd 3401 (2010) ("*CIMCO*").

NTELOS[7] – provide evidence of the costs and burdens that the application of Section 652 can impose when cable companies and CLECs (or their affiliates) desire to merge.

CIMCO shows that local franchise authorities ("LFAs") can and will use their veto power under Section 652 to delay or disrupt competition-enhancing transactions for reasons that are unrelated to the case at hand. In *CIMCO*, the parties were required to serve notice of Comcast's proposed acquisition of CIMCO's assets in 274 of Comcast's LFAs.[8] Only one LFA – the City of Detroit, MI (the "Detroit LFA") – raised any objections; those objections concerned Comcast's alleged failure to comply with the terms of its cable franchise and had little if anything to do with the impact of the proposed transaction on competition.[9] The FCC determined that the transaction would foster facilities-based competition in the enterprise market and was not likely to result in any competitive harm because Comcast and CIMCO principally served two different market segments and did not compete with each other.[10] Although the Commission approved the transaction, the FCC conditioned its grant of a Section 652 waiver for Detroit upon approval of the transaction by the Detroit LFA.[11] The parties closed the transaction six months after filing their FCC applications, apparently by eliminating the Detroit assets from the deal.[12]

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7 *Applications Granted For the Transfer of Control of FiberNet from One Communications Corp. to NTELOS Inc*., WC Docket No. 10-158, Public Notice DA 10-2252, rel. Nov. 29. 2010 ("*NTELOS*").

8 *CIMCO*, 25 FCC Rcd at 3408.

9 *See* Comments of the City of Detroit, MI in WC Docket No. 09-183, filed Mar. 1, 2010; *CIMCO*, 25 FCC Rcd at 3415 (Detroit LFA fails to provide any specific evidence to suggest why the proposed asset sale is likely to harm competition).

10 *CIMCO*, 25 FCC Rcd at 3402-3403.

11 *Id.*, 25 FCC Rcd at 3402.

12 *See* Letter from Gunnar D. Halley, counsel to Comcast, to Marlene H. Dortch, Secretary, FCC in WC Docket No. 09-183, filed Apr. 15, 2010.

NTELOS shows that application of the cable/LEC buyout restrictions in Section 652 can create significant burdens and delays not only for the parties to the merger, but also for the LFAs and other entities not involved in the transaction. In this transaction, NTELOS, which was affiliated with a cable operator, Suddenlink, sought to purchase a CLEC, Fibernet, which had subsidiaries providing local exchange service in several of Suddenlink's franchise areas.[13] Since Section 652(b) prohibits cable operators "or affiliates of a cable operator" from acquiring a 10 percent or greater financial interest in any local exchange carrier providing telephone exchange service within the cable operator's franchise area,[14] the Commission found that the transaction was subject to the cable/telephone buyout restrictions of Section 652.[15] To obtain a waiver of Section 652, NTELOS and FiberNet were required to provide individual notice of the transaction to numerous Suddenlink LFAs -- despite the fact that Suddenlink was not involved in the transaction and the parties did not know the identity of the Suddenlink LFAs.[16] Following Suddenlink's submission of its LFA list pursuant to a protective order, NTELOS and FiberNet provided the required notice to the relevant LFAs, which apparently created confusion among the

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13 NTELOS and Suddenlink were affiliated because Quadrangle, a private investment firm, held minority, non-controlling interests in both Suddenlink and NTELOS, and was represented on the Board of Directors of each company. *See* Joint Domestic and International Application and Request for Waiver, FiberNet of Virginia, Inc., et al., WC Docket No. 10-158, filed July 30, 2010, at 13. Affiliation for the purposes of Section 652(b) is determined in accordance with Sections 76.505(f), 76.505(g), and 76.501 of the FCC Rules. *See* 47 CFR §§ 76.505(f) (entities are affiliated for the purposes of this section if either entity has an attributable interest in the other, or if a third party has an attributable interest in both entities), 76.505(g) (attributable interest shall be defined by reference to the criteria set forth in Notes 1 through 5 to § 76.501, the cable attribution rules), and 76.501 note 2(a) (partnership, direct ownership interests, and any voting stock interest amounting to 5 percent or more of the outstanding voting stock of a corporation will be cognizable).

14 47 U.S.C. § 572(b).

15 *See Applications Filed For the Transfer of Control of FiberNet from One Communications Corp. to NTELOS Inc*., WC Docket No. 10-158, Public Notice DA 10-1754, rel. Sept. 16, 2010, at 4 ("*NTELOS Public Notice*").

16 Suddenlink and NTELOS stated that they viewed each other as competitors and shared nothing other than a common investor. *Id.*, at 5-7.

LFAs about the nature of the transaction, Suddenlink's involvement in it, and the LFAs' associated rights and responsibilities.[17] None of the LFAs objected to the transaction.[18]

C. Limiting the application of Section 652 as proposed is consistent with the purposes of Section 652 and will not compromise the rights of interested parties to object to a proposed CLEC-cable company transaction.

Limiting the application of Section 652 to transactions between incumbent local exchange carriers ("ILECs") and cable companies will eliminate the uncertainty created by *CIMCO* and *NTELOS* and will encourage cable company-CLEC transactions, to the ultimate benefit of American consumers and businesses. Such an interpretation of Section 652 is consistent with the history and underlying purpose of this section. Section 652 was adopted as part of the Telecommunications Act of 1996, which opened the markets for local telephony services to competition. As the Commission has recognized, the intention of Section 652 was to maintain the inherent facilities-based competition between the ILEC and the incumbent cable operator serving a community as local services competition emerged.[19] Concerns about the preservation of such facilities-based competition are not implicated by mergers between cable companies and CLECs. Furthermore, as shown by *CIMCO* and *NTELOS*, alliances between cable companies and CLECs can enhance rather than hurt facilities-based competition, as cable operators bring capital and stability to CLECs and CLECs bring business telephony expertise to cable companies.

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17 *See* Letter of Christopher S. Koves, counsel to One Communications Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-158, filed Dec. 7, 2010, "Answers to Frequently Asked Questions About the NTELOS-FiberNet Transaction and its Relationship to Suddenlink" ("*NTELOS Ex Parte*").

18 While four LFAs notified the Commission of their approval of the transaction (*see NTELOS* at 3), it appears from the *NTELOS Ex Parte* that the parties solicited at least some of these approvals. *See NTELOS Ex Parte*, "Summary of Local Franchising Authority Outreach Efforts 11/16/10," at 2.

19 *See US West*, Memorandum Opinion and Order, 13 FCC Rcd 4402 (1998).

At the same time, limiting the application of Section 652 as NCTA proposes in its Petitions will not compromise the rights of LFAs or other interested parties vis-à-vis CLEC-cable company mergers. Such transactions will continue to be subject to the Commission's approval processes for transfers of control and assignment of assets. Interested parties, including potentially affected LFAs, will still have notice of the proposed transaction and an opportunity to object. The views of LFAs and other interested parties will continue to be a factor in the Commission's determination of whether consumption of the proposed transaction would serve the public interest.

III. THE PETITIONS SATISFY THE APPLICABLE LEGAL CRITERIA FOR APPROVAL.

Since the public interest would be served by restricting the applicability of Section 652 as proposed by NCTA, the Commission should grant NCTA's requested relief. The PDR and the Forbearance Petition each satisfy the applicable legal criteria for grant.

The Commission has broad discretion to issue declaratory rulings to terminate a controversy or remove an uncertainty.[20] In the past, the Commission has used declaratory rulings to clarify ambiguous provisions of the Act or the FCC rules.[21] Section 652 is inherently ambiguous. The definition of "telephone service area" that appears in Section 652(e) effectively excludes most if not all CLECs, since it includes only those areas in which the LEC was providing telephone exchange services as of January 1, 1993.[22] As such, Section 652(a) as a practical matter gives free rein to CLECs to acquire cable companies, since Section 652(a) only

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20 *See* 5 U.S.C. § 554(e); 47 CFR § 1.2.

21 *See Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances That Classify All Wireless Siting Proposals as Requiring a Variance, Declaratory Ruling*, 24 FCC Rcd 13994 (2009).

22 *See* 5 U.S.C. § 572(e).

prohibits such transactions when the cable company provides cable service within the CLEC's "telephone service area." However, Section 652(b) would prohibit the same cable company from acquiring the same CLEC without a waiver -- despite the fact that both transactions would have the same competitive effect. A declaration that Section 652 does not apply to transactions between cable companies and CLECs would eliminate this *non sequitor*.

Similarly, the Forbearance Petition satisfies the criteria for grant of forbearance requests as set forth in Section 10(a) of the Act. Section 10(a) states that the Commission shall forbear from applying any regulation or any provision of the Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, if the Commission determines that:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.[23]

It is not necessary to apply the cable/LEC buyout restrictions of Section 652 to ensure that rates, terms and conditions for the provision of telecommunications services by CLECs are just, reasonable, and not unjustly or unreasonably discriminatory, or to protect consumers. Cable operators and CLECs are non-dominant providers of telecommunications services, lacking market power in the provision of local exchange services. In addition, they generally serve different segments of the local market, with cable primarily serving residential customers and CLECs business customers. As shown above, forbearance from the application of Section 652 to

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[23] 47 U.S.C. § 160(a).

cable company/CLEC transactions is consistent with the public interest, since mergers between CLECs and cable companies promote facilities-based competition in the provision of local services.

IV. IF THE FCC DOES NOT GRANT THE PETITIONS, THE COMMISSION SHOULD ESTABLISH RULES TO FACILITATE THE GRANT OF SECTION 652 WAIVER REQUESTS.

As demonstrated herein, grant of the Petitions is lawful and would serve the public interest. If the Commission decides not to restrict the applicability of Section 652 as proposed by NCTA, the FCC should, at a minimum, adopt rules to govern the process for obtaining a waiver of the cable-telephone company buyout restrictions under Section 652(e). *CIMCO* and *NTELOS* establish that the waiver process can and will place undue and unreasonable burdens on LFAs as well as on cable companies, CLECs, and related entities, thereby impeding transactions that serve the public interest.

Among other things, the Commission should limit the grounds on which an LFA's objection to a CLEC/cable company merger will veto the waiver to transaction-specific reasons. Certainly an LFA can raise any and all objections to a merger, and the FCC should consider those objections in determining whether the public interest is served by the proposed transaction. However, any exercise of an LFA's veto power over a transaction should be based on the rationale underlying Section 652, *i.e.*, to preserve facilities-based competition between the incumbent cable and telephone companies in a community. Otherwise, if an LFA has the right to veto a transaction for any reason, the Commission has effectively abdicated to the LFA its obligation under the Act to approve transfers of control and assignments of assets involving cable companies and telecommunications providers. LFAs should not look to the Section 652

waiver process to resolve contractual or other disputes with cable companies that have no bearing on the proposed merger or acquisition.

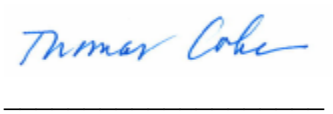
In addition, the Commission should establish a range of procedures for notifying affected LFAs about a proposed transaction, and tailor the notice process required to the circumstances of the particular case. In the NTELOS-FiberNet transaction, requiring the parties to provide individual notice of the transaction to Suddenlink's LFAs served no one's best interests. The LFAs were confused by the notice, which had no obvious relevance to them or their communities. NTELOS and FiberNet had no knowledge of or relationship with the Suddenlink LFAs that they were required to serve. To facilitate the notice, Suddenlink disclosed information it considered competitively sensitive to its competitor, albeit under a protective order. Under the circumstances, the public interest would have been better served by employing an alternative form of notice, such as newspaper publication in those communities where both Suddenlink and FiberNet provided service. The Commission's Rules recognize the sufficiency of alternative forms of notice (including newspaper publication) in other situations involving the transfer of control of a licensee.[24]

[24] *See* 47 CFR 73.3580.

V. CONCLUSION.

For these reasons, the Commission should grant the Petitions and thereby determine that Section 652 of the Act does not apply to mergers and acquisitions between cable companies and CLECs.

Respectfully submitted,



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